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Public Prosecutor v Joseph ak Madang

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COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-05(SH)-44–01 OF 2016
DAVID WONG, PRASAD ABRAHAM AND MARY LIM JJCA
19 SEPTEMBER 2017

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Criminal Procedure — Charge — Alteration or amendment of — Reduced charge — Whether learned trial judge erred in law and fact when amending charge — Penal Code ss 302, 304(b)

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The respondent was initially charged under s 302 of the Penal Code ('the Code') for allegedly murdering his biological father. The respondent pleaded not guilty to the charge preferred against him and claimed trial. The charge against the respondent was later reduced to s 304 of the Code. At the end of the defence stage, the respondent was convicted and sentenced to seven years imprisonment. The appellant subsequently appealed. The main crux of argument by the appellant was whether the learned trial judge had erred in law and fact when His Lordship amended the charge under s 302 to a charge under s 304(b) of the Code.

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Held, dismissing the appeal and upholding the respondent's conviction on the reduced charge:

(1) The learned judge had not erred on facts and law and there was no basis for appellate intervention since a charge of murder pursuant to s 300 of the Code could not be proven. The learned trial judge was right to direct his mind to amending the charge to one of culpable homicide not amounting to murder (see paras 8 & 10).

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(2) The learned trial judge was at liberty to reduce the charge initially proffered against the respondent when His Lordship, upon analysing and evaluating material evidence before him, found that the ingredients of murder were not fulfilled (see para 12).

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[Bahasa Malaysia summary

Responden pada mulanya dituduh di bawah s 302 Kanun Keseksaan ('Kanun') kerana didakwa membunuh bapa kandungannya. Responden mengaku tidak bersalah kepada tuduhan yang dikenakan terhadapnya dan menuntut perbicaraan. Tuduhan terhadap responden kemudiannya dikurangkan kepada s 304 Kanun. Pada akhir peringkat pembelaan, responden disabitkan dan dihukum penjara tujuh tahun. Perayu kemudiannya merayu. Teras utama hujahan oleh perayu adalah sama ada hakim perbicaraan yang bijaksana telah

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terkhilaf dari segi undang-undang dan fakta apabila Yang Arif meminda tuduhan di bawah s 302 kepada tuduhan di bawah s 304(b) Kanun.

Diputuskan, menolak rayuan dan mengesahkan sabitan responden atas tuduhan yang dikurangkan:

(1) Hakim yang bijaksana tidak terkhilaf dari segi fakta dan undang-undang dan tidak terdapat asas bagi campur tangan mahkamah rayuan memandangkan tuduhan membunuh berikutan s 300 Kanun tidak dapat dibuktikan. Hakim perbicaraan yang bijaksana betul untuk mengarahkan mindanya untuk meminda tuduhan kepada satu homisid salah yang tidak menjumlahkan kepada pembunuhan (lihat perenggan 8 & 10).

(2) Hakim perbicaraan yang bijaksana adalah bebas untuk mengurangkan tuduhan yang pada mulanya dikenakan terhadap responden apabila Yang Arif, setelah menganalisa dan menilai keterangan material di hadapannya, mendapati bahawa bahan pembunuhan tidak dipenuhi (lihat perenggan 12).]

Notes

For cases on alteration or amendment of charge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1387–1498.

Cases referred to

Looi Wooi Saik v Public Prosecutor [1962] 1 MLJ 337, CA (refd)

Legislation referred to

Penal Code ss 300, 300(c), ss 302, 304, 304(a), (b)

Appeal from: Criminal Trial No MYY-45B-4/11 of 2014 (High Court, Miri)

Hamdan bin Hamzah (Public Prosecutor, Attorney General's Chambers) for the appellant.
Shikh Rajjish Ahmad (Shad & Partners) for the respondent.

Prasad Abraham JCA:

INTRODUCTION

[1] The respondent was charged at the instance of the public prosecutor before the High Court of Sarawak at Miri and the charge against the respondent is as follows:

> Bahawa kamu 10.3.2013 jam lebih kurang pukul 12.30 tengahari bertempat di Ruai Bilik No 24, Rumah Sabang, Sungai Sawai, Suai, Niah, di dalam daerah Miri,

dalam Negeri Sarawak, telah membunuh MADANG ANAK SENGKALANG (L) (KPT: 6111013-13-5661) dan dengan ini kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan.

[2] The respondent pleaded not guilty to the charge preferred against him and claimed trial. The charge was then reduced to s 304 of the Penal Code. At the end of the defence stage, the respondent was convicted and sentenced to seven years imprisonment. Hence the appeal before this honourable court.

THE BRIEF OF FACTS OF THE PROSECUTION'S CASE

[3] The brief facts are as per the judgment of the learned trial judge at p 3, Vol 2 of the record of appeal:

The Accused in his evidence in chief testified, inter alia, as follows:

At about 8.30 am, I was informed by the rumah panjang's residents that there will be distribution of mosaics by Tuai Rumah to the residents of the rumah panjang. I and my wife then went to the place where the said distribution of mosaics was held in which each resident was given 20 boxes of mosaics.

At about 9.00 am I saw my late father came and met the Tuai Rumah and asked for a bottle of 'Cap Apek'. At that time I saw him came from the direction of our rumah panjang. At that time, I was with the Tuai rumah and I heard the said Tuai Rumah said to my late father that he can give my late father a bottle of 'Cap Apek' if my late father can pay him in cash. Actually the reason the said Tuai Rumah asked for cash was because he wanted to stop my late father to drink more as my late father was already drunk and he knew that my late father did not bring cash money with him.

Then my late father left in anger and was not happy as his request was turned down by the said Tuai Rumah. At that time my wife and children went back to our room.

At about 9.30am, when I was still at the said Tuai Rumah house, my wife came to me and informed me that my late father wanted to follow my brother, Suboh who had gone earlier to Kebun to sell oil palm fruits. My wife told me that he had tried to stop my late father to ride the motorcycle as he was drunk but my late father refused to listen and rode the motorcycle. May be he wanted to go to my brother to get some cash to buy the alcohol.

I just stood there and saw him riding the motorcycle but I was a bit worry as my late father was in the state of drunkenness and might not be could not ride the motorcycle properly. Not long after that I saw my late father stopped his motorcycle at the canteen.

At about 11.30 am, I saw my late father went back to our Rumah Panjang using the motorcycle. Then I and my wife also went back home. Upon reaching home, I sat at the living room while my wife went straight to the kitchen and my late father was also at the kitchen and brought with him some food. While I was sitting at the living area, I heard the conversation between my late father and my

wife that my wife told him not to waste his money and if he has money from the proceeds of sale of oil palm fruits it is better to spend the money to buy food instead of buying alcohol. Then I heard my late father raising his voice in a hard and loud tone and was scolding my wife up until the living room where I was seated.

At that time I told my wife not to ask for money from my late father as I afraid my late father will talk or lift about it again in the future. I was trying to stop the quarreling between my late father and my wife but my late father was not happy and was in anger and threw a black plastic bag containing money on the floor and said '*ambillah semua duit itu …*'. Then I said to my wife, *'tak payah minta duit dengan bapak, nanti kalau saya dah ada gaji kita akan ke pasar dan beli makanan untuk anak-anak … tak perlu nak harapkan duit orang*'. My late father was still unhappy and at the same time my wife went out of the house together with one of our children but my late father was still scolding and said harsh words towards my wife and asked us to leave the house. Once again, I tried to stop my late father but to no avail as my late father was drunk at that time and kept on talking.

At that time, due to anger as what had been said and done by my late father, I stood up from a seating position and quarreled with my late father until up to the 'Ruai' of the house. We were pushing each other. Then I pushed my late father to the wall near to the door of our house. I was pushing him using my both hands on his chest and neck. I did not strangle my father. My father then fell onto the cement floor by himself as he was weak and drunk and he fainted. I did not have any intention to cause bodily injury or death to my own father as I was close to him more than my other two siblings. I did not hit my father's head to the wall or floor as alleged against me. These are false statement and were made up by the witnesses to frame me due to hatred and to blame me for my late father's demise. At that time my brother, Suboh Anak Madang was outside the house repairing his motorcycle. I did not know that my late father had died after that as I thought that he was drunk and was sleeping as he used to do. My late father did wake up after that and went to the toilet. I did not kill my late father. I did not use or bring any weapon at that time. Should we know that my late father was injured or dying, we could have brought him immediately to the clinic or hospital for immediate medical treatment.

After the incident, I went to my wife and children who were outside the house and brought them to my grandmother's house located nearby as my late father had asked us to leave the house before the incident. At my grandmother's house, I did inform my grandmother that I was quarrelling with my late father and my late father asked us to leave the house but my grandmother did not say anything.

At about 7.30 pm on 10.3.2013, when I was still at my grandmother's house, I was informed by my aunty that my late father had passed away. I immediately with my wife and one of our children went back to our house to confirm about the news. Upon arrival at the outside of the house I saw a crowd of people were gathering at that place and I saw my late father was still lying at the 'Ruai' in front of the door. Then I went inside the house and waited inside. Not long after that a police team came and arrested me and I was brought to Balai Polis Batu Niah. I did not resist the arrest by police as I know I did not kill or have any intention

to kill my late father. My wife and family used to visit me at the prison a few months after the incident but stopped after that and knew that I did not kill my late father. However, in Court my wife and my brother were totally different when they gave evidence in Court. Maybe my wife is afraid that if I am released from prison I would disturb her life with her new husband. I am betrayed by my own family for an offence that I did not commit.

I did not have any intention to injure my own father what more to kill him as I had just lost my mother. I did not commit the offence as charged against me under Section 302 Penal Code. I am telling the truth nothing but the truth in my evidence.

AT THE HIGH COURT

[4] The learned trial judge, found that a charge of murder was not made out and proceeded to consider a charge of culpable homicide pursuant to s 304(a) and 304(b) His Lordship at para 30 of his grounds of judgment held:

From the evidences led by the prosecution and the evidence of the accused, this court finds that it is not safe for this court to convict the accused under s 302 of the Penal Code. However, there is sufficient evidence to prove that the accused had committed an offence under s 304(b) of the Penal Code. This court finds that there was no premeditation on the accused's part to kill the deceased. The evidence show that the unfortunate incident happened suddenly due to the sudden quarrel between a father (the deceased) and his son (the accused).

THE APPEAL BEFORE US

[5] The main crux of argument by the prosecution is that the learned trial judge had erred in law and fact when His Lordship amended the charge under *s 302 of the Penal Code to a charge under s 304(b) of the Penal Code*. The prosecution submitted that the learned trial judge had erred in reducing the charge against the accused as His Lordship did not adequately consider these evidences:

(a) whether the evidence of PW12 was properly evaluated;

(b) whether the provocation was grave and sudden as to make the accused lose his self-control; and

(c) whether the test to be adhered in considering s 300(c) of the Penal Code was sufficiently addressed.

OUR DECISION

[6] We are of the view that the learned trial judge was correct in amending the charge of murder to one of culpable homicide not amounting to murder. In doing so, he had convicted the accused to seven years imprisonment. We now

set out s 304(a) and (b) of the Penal Code:

> *304 Punishment for culpable homicide not amounting to murder.*
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> Whoever commits culpable homicide not amounting to murder shall be punished –
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> (a) with imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
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> (b) *with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.*

[7] The learned trial judge had evaluated and considered all material evidence before, coming to such a conclusion and convicting the accused for culpable homicide not amounting to murder.

We now reproduce the relevant portions of His Lordship's grounds of judgment.

> [21] ... This court finds that the accused's attack on his father, the deceased, did not cause the death of the deceased as he merely pushed the deceased, using both his hands on the deceased's chest and neck. PW11, the pathologist had testified that the cause of death of the deceased was intracranial bleeding with large fracture of skull due to blunt head injuries. Further this court finds that the accused did not at that material time, the requisite intention and motive to kill his father. The accused lost his temper after being scolded and/or provoked by his late deceased father and reacted angrily, by using both his hands and pushed against the deceased's chest and neck.
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> [22] PW12, the ex-wife of the accused, testified that after the deceased was pushed by the accused, she saw the deceased regained from his unconsciousness and requesting for others to help him to bring him to the toilet. The deceased walked from the living room to the toilet which is about 40 meters. From the toilet, the deceased went to the Ruai as the living room was packed with people. PW12 agreed that the deceased could have felt while he was in the toilet as he was quite weak at that time and he could not stand up by himself. During re-examination, PW12 testified that the deceased might have fallen down in the toilet because his condition at that time was too weak.
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> [23] PW10, the chemist testified that she detected 106mg of ethyl alcohol per 100 milliliters from the blood taken from the deceased and based on her knowledge this level of alcohol in the blood is considered high for a person. PW10 further stated there is a possibility that the deceased was drunk and also said that the level of alcohol permissible under Road Transport Act is 80mg/100ml of blood. PW10 further stated that the alcohol level content in the urine of the deceased which is 171/100ml, is considered very high and can caused intoxication or drunkenness, can affect motor coordination, caused decreased sensory, decreased judgment, confusion, disorientation, impaired balance and slurred speech. She further testified

that exh P9(8) which stated 'gambar di atas menunjukkan perut si mati yang dipenuhi air yang dipercayai air minuman keras' is consistent with her toxicology analysis findings.

[24] In the light of the above pertinent portions of the testimonies of PW12 and PW10, this court finds that it is highly probable that the deceased in his weak and drunken state could have fallen down when he was in the toilet and suffered the fatal injury as a result of his fall. PW11, the pathologist has testified that the injuries inflicted by the accused were not the cause of the death of the accused.

[8] The learned trial judge was correct in law and in fact when he had properly analysed the facts and evidences as well as the demeanour of the accused before concluding that s 300 of the Penal Code was not proven. In para 27 of his grounds of judgment he held and we quote:

[27] This court having the benefit of observing the demeanour of the accused giving evidence finds that the accused is a reliable witness and that his evidence is unshaken. The accused testified in a straightforward manner and this court finds that his testimony was credible and capable of belief. This court gets the clear impression that the accused came across as a truthful witness. As a witness it is clear that the accused had no inclination to embellish evidence, a common characteristic among dishonest witnesses. This court prefers the evidence of the accused over that of the prosecution's witnesses, in particular PW9 for reasons which shall given later. The testimony of the accused should be accepted as truth and the benefit of the doubt should be given to him. Clearly from the totality of the evidence adduced, this court finds that the accused has no motive and intention to murder his own father ie, the deceased as the whole incident arose spontaneously as a result of a quarrel with the Accused and his late father. *In the premises, this court finds that the ingredients under s 300 of the Penal Code have not been proven.* (Emphasis added.)

We find that the learned judge had not erred on facts and law and there was no basis for appellate intervention.

[9] There was overwhelming evidence, that the accused did not fulfill the requirements to be charged and convicted of murder. However, there was evidence that the accused had acted without intention to cause death of his own father.

[10] We agree with the learned trial judge, that since, a charge of murder pursuant to s 300 of the Penal Code could not be proven, hence it was right approach that the learned trial judge, direct his mind to amending the charge to one of culpable homicide not amounting to murder. Thus the learned trial judge was right in reducing the charge, in which he had considered all the relevant factors before coming to such a conclusion.

[11] We refer to the Court of Appeal decision of *Looi Wooi Saik v Public Prosecutor* [1962] 1 MLJ 337 and to the judgment of Thomson CJ, and we

quote:

> In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence given by the defense which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation.
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> This, of course, is the same as the position which has been accepted to be in England since *Woolmington*'s case. As was said by Lord Sankey in *Woolmington*'s case (at p 481):
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> > If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accuse which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.
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> That is the golden thread and it is a source of satisfaction to be able to conclude that in this country we are not compelled to reduce the fineness of the gold.

We agree with the aforesaid proposition in law.

[12] The learned trial judge was at liberty to reduce the charge which was initially proffered against the accused when His Lordship, found upon analysing and evaluating the material evidence before him found that the ingredients of murder was not fulfilled. We therefore find that the conviction of the accused on the reduced charge was safe and is upheld. We therefore accordingly dismissed the appeal.

Appeal dismissed; conviction on reduced charge upheld.

Reported by Fatin Mohd Ismail